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Dignity, Rank, and Rights

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Lecture 1: Dignity and Rank

1. *Law and Morality*

My subject is human dignity. Dignity, we will see, is a principle of morality and a principle of law. It is certainly a principle of the highest importance, and it ought to be something we can give a good philosophic account of. That is what I am going to try to do in these lectures.

It is a topic that we can come to through law—analyzing the preambles of various declarations of human rights, for example, or interpreting the legal rules that prohibit inhuman and degrading treatment—or it is something we can treat as, in the first instance, a moral idea.

On the second approach, which seems like a natural one to adopt, we begin with dignity as a moral idea and then we look to see how adequately or how clumsily that moral idea has been represented in the work of the drafters of statutes, constitutions, and human rights conventions or in the decisions that constitute our legal doctrines and precedents. So on this approach, before we get anywhere near the law, we look for the sense that moral philosophers have made of the concept of dignity—Immanuel Kant, for example, or modern philosophers like Stephen Darwall or James Griffin.[1]

That is a tempting approach. But moral philosophy is not our only philosophical resource for exploring an idea like dignity. What if we were to approach things from the opposite direction? Dignity seems at home in law: law is its natural habitat. We find it in many legal documents and proclamations: in the opening provision of

Germany's Basic Law, for example, in the South African constitution, and in the International Covenant on Civil and Political Rights (ICCPR).[2] We tell ourselves that this must be a case of the law using a moral ideal. But maybe morality has more to learn from law than vice versa. So let us begin by analyzing how the concept works in its legal habitat and see whether the jurisprudence of dignity can cast any light on its use in moral discourse. Joseph Raz said to me a few weeks before I delivered these lectures that "dignity" is not a term that crops up much in ordinary moral conversation. Its presence is an artifact of philosophers' trying to make sense of ordinary moral ideas (like value and respect). Like "utility," it is a constructive idea with a foundational and explicative function. If it has been imported from law to perform this constructive function, then we had better turn first to jurisprudence to find out something about the distinctive *legal* ideas that the moral philosophers have appropriated.[3]

So, for example: the moral philosophers tell us that dignity is a matter of status. But status is a legal conception and not a simple one.[4] Dignity, we are told, was once tied up with rank: the dignity of a king was not the same as the dignity of bishop and neither of them was the same as the dignity of a professor. If our modern conception of human dignity retains any scintilla of its ancient and historical connection with rank—and I think it does: I think it expresses the idea of the high and equal rank of every human person[5]—then we should look first at the bodies of law that relate status to rank (and to right and privilege) and see what if anything is retained of these ancient conceptions when dignity is put to work in a new and egalitarian environment.

Dignity is intimately connected with the idea of rights—as the ground of rights, the content of certain rights, and perhaps even the form and structure of rights. It would be a brave moral philosopher who would say that the best way to understand rights (or a concept connected with rights) is to begin with moral ideas and then see what the law does with those. Surely it is better to begin (as Hohfeld

did)[6] with rights as a juridical idea and then look to see how that works in a normative environment (like morality) that is structured quite differently from the way in which a legal system is structured.[7] I think the same may be true of dignity. Even as the ground of rights—as when we are told in the preamble to the ICCPR that the rights contained in the covenant "derive from the inherent dignity of the human person"—dignity need not be treated in the first instance as a moral idea. After all it is not just surface-level rules that are legal in character (as though anything deeper must be "moral"). I follow Ronald Dworkin in believing that grounding doctrines can be legal too—legal principles, for example, or legal policies.[8] Law creates, contains, envelops, and constitutes these ideas. It does not just borrow them from morality.

So this is the point I want to begin with: it is probably not a good idea to treat dignity as a moral conception in the first instance or assume that a philosophical explication of dignity must begin as moral philosophy. Equally we should not assume that a legal analysis of dignity is just a list of texts and precedents, in national and international law, in which the word "dignity" appears. There is such a thing as legal philosophy, there are such things as legal principles, and it is a jurisprudence of dignity, not a hornbook analysis that I will be pursuing in these lectures.

2. *A Variety of Uses*

There does not seem to be any canonical definition of "dignity" in the law. One esteemed jurist has observed that its intrinsic meaning appears to have been left to intuitive understanding.[9]

If you glance quickly at the way in which "dignity" figures in the law, you will probably get the impression that its usage is seriously confused. Dignity is defined one way in a legal document, then defined another way in a different document. As a concept it performs one sort of legal function; then the law has it performing quite a

different function, locating it as a concept in a different category from the first. Moral philosophers tend to notice these things, and I am sorry to say that the indignant recording of such impressions is what passes for philosophical analysis in some circles.

In fact I think patience and thoughtfulness actually pay off in this area, as they often do in responding to destructive analytic critique. Sometimes the various ideas associated with what we suspect is an ambiguous term in fact turn out to make complementary rather than rival contributions to its meaning. Consider an analogy. Some people say that "democracy" means "rule by the people." Some say it means "political equality." Some say, with Joseph Schumpeter, that democracy is just a political system to secure stability by providing for regular competition for power among elites on an institutionalized basis.[10] Now we can see these three meanings as rival definitions if we like, and complain about the inherent confusion of the term. But we should first check whether the alleged ambiguities might not be combinable as complementary contributions to a single multifaceted idea: democracy is a system of regularized competition among political elites, organized on the basis of political equality, with the effect of giving the common people substantial control over their government. We combine the three meanings in a single consistent but complicated definition. So it might be with human dignity: we might be able to turn the tables on the destructive analytic critic, by insisting that what he reads, superficially, as ambiguity is in fact a reflection of the rich and complementary aspects of the meaning of this multifaceted term.[11]

But some of the apparent difficulties might be harder to parse. The human rights charters tell us that dignity is inherent in the human person; they also command us to make heroic efforts to establish everyone's dignity. Is this an equivocation?[12] Jeremy Bentham used to make fun of a similar dualism in the use of the term "liberty." Defenders of natural rights would say that men are born free, but would then go on to complain in the name of rights that so many of them were born into slavery.[13] "Men ought to be free because they are free, even though they are not"—was that the claim? Such reasoning, which Bentham called "absurd and miserable nonsense," seemed to veer between the incoherent and the tautological.[14] In fact the appearance of equivocation is easily dispelled. In a slave society, a person might be identified as a free man in a juridical sense—that is his legal status—even though he is found in conditions of slavery. (He may have been enslaved by mistake or kept erroneously in chains after his emancipation.) So, similarly, one might say that every human person is free as a matter of status—the status accorded to him by his creator—even though it is the case that some humans are actually in chains and need to have their freedom represented as the content of a normative demand. The premise may be problematic for those who reject its implicit metaphysics, but the overall claim is not incoherent. And the same logic may work for "dignity." On the one hand, the term may be used to convey something about the inherent rank or status of human beings; on the other hand, it may be used concomitantly to convey the demand that that rank or status should actually be respected.

A more interesting duality of uses has to do with the distinction between dignity as the ground of rights and dignity as the content of rights. On the one hand, we are told that human rights "derive from the inherent dignity of the human person." On the other hand, it is said that people have a right to be protected against "degrading treatment" and "outrages on personal dignity."[15] Dignity is what some of our rights are rights *to*; but dignity is also what grounds all of our rights. I have my doubts about the claim that rights derive from any single foundation, be it dignity, equality, autonomy, or (as it is now sometimes said) security. In any case, I want to leave this duality of ground and content in place. It is perfectly possible that human dignity could be the overall telos of rights in general, but also that certain particular rights could be oriented specifically to the explicit pursuit of that objective or to protecting it against some standard threats to dignity, while others are related to this goal in a more indirect sort of way.

I am actually going to argue against a reading of the dignity idea that makes it the goal or telos of human rights. I think it makes better sense to say that dignity is a normative status and that many human rights may be understood as incidents of that status. (The relation between a status and its incidents is not the same as the relation between a goal and the various subordinate principles that promote the goal; it is more like the relation between a set and its members.) Still, if human dignity is regarded as a rank or status, there remains a duality between general norms establishing that status and particular norms like those that prohibit degradation, which are indispensable to the support of dignity.

Here is an analogy. The relation between these two sorts of norms might be like the relation between the general status or dignity of a judge and the specific offense of contempt of court. Protection against contempt is not all that there is to being a judge, but a ban on contempt might still be thought indispensable to judicial dignity. And not just a ban on contempt; more affirmative provisions may also be important. The Constitution of Poland stipulates that "[j]udges shall be granted . . . remuneration consistent with the dignity of their office."[16] And there may be other accoutrements too—gowns, wigs, formal modes of address, an order of precedence at banquets. These are all important for judicial dignity. But they do not exhaust the status of a judge; her status has to do also with her role and with her powers and responsibilities.

Something analogous may be true for human dignity in general: we can distinguish between dignity as a general status and the particular rules that protect and support it. Some of these particular rules are affirmative, like the provision in the Universal Declaration of Human Rights which says that "[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."[17] And some are negative, like the ban on degrading treatment. Both kinds of protection are important. But they are not all there is to human dignity. We need to get at what dignity—the status—in general involves.

Some may see this as too ambitious. A more modest approach might simply take the various specific prohibitions on degradation at face value without necessarily assuming that they are ancillary to the broader enterprise of upholding a general rank or status of human dignity.[18] Consider the prohibitions on "degrading treatment" in the human rights covenants.[19] Should we not just say that these are intended to protect people against a very specific evil of gross humiliation, particularly in situations like detention, incarceration, hospitalization, and military captivity—situations of more or less comprehensive vulnerability with total control by others of a person's living situation? Should we not just say that that is all that these provisions are for? Why do we have to work up a general account of dignity? Surely all we require is a retail theory, which may be no more extensive than is needed to make sense of these particular prohibitions.

But even if we were to take that tack, it would still leave the question of what the law is doing when it also talks in more general (wholesale) terms about the dignity of the human person. And it does. Since we have to give an account of that *anyway*, it is surely worth striving to produce a theory that unifies what we say about dignity in general and what we say about these specific (or retail) dignitarian requirements.

3. *Is There a Need for a Moral Foundation?*

Human rights law suggests that dignity is the ground of rights: in the words of the ICCPR Preamble, rights "derive from the inherent dignity of the human person." Does this assume a moral ideal of dignity that serves as an extralegal grounding for human rights?

Not necessarily. The Covenant gives us the *legal ground* of the rights set out in the body of its text, but it is a further question whether this is supposed to be the legal representation of a moral conception. Maybe every legal idea has a moral underpinning of

some sort; but it would be a mistake to think that the moral underpinning has to have the same shape or content as the legal ground.

Consider as an analogy Hannah Arendt's account of the ancient Athenian commitment to political equality among free-born male citizens. The Athenians adopted a legal principle of treating one another as equals, not because of any moral conviction about real equality between them, but because such a principle made possible a form of political community they could not otherwise have. For their engagement in the joint enterprise of politics, the community created for each of them an artificial *persona*—the citizen—that could take its place on the public stage, presenting them as equals for political purposes. The community did this using artificial techniques like the equal right to speak in the assembly, the equality of votes, the equal liability to be drafted into a jury, and so on.[20] Human dignity might be something similar. There might be a point to its legal recognition, but that point need not be an underlying moral dignity.

That is a possibility. Of course many philosophers do believe in an underlying moral dignity. In his recent book *On Human Rights*, James Griffin has defended a moral account of dignity, which he thinks underlies human rights. He adopts his conception of dignity from a fifteenth-century writer, Pico della Mirandola—though he drops most of the very substantial theology that Pico associates with dignity—and he comes to the conclusion that the key to dignity is the human capacity to "be that which he wills" (which Griffin relabels normative agency).[21] "The sort of dignity relevant to human rights," Griffin says, "is that of a highly prized status: that we are normative agents."[22] He says that our human rights are derived from our dignity, understood in this way. Sometimes the way he says this indicates that normative agency is the telos of our rights: human rights are a means to normative agency as an end; we have a right to welfare, for example, because you can't exercise normative agency when you are hungry.[23] Other times, what he says conveys the point that protecting our rights *vindicates* our normative agency (e.g., by respecting our choices), which is a rather different idea.[24]

The second of these formulations is more closely connected to dignity as status. In general a status is not a goal or a telos: a status *comprises* a given set of rights rather than defining them as instrumentalities. I am attracted to the status account, and much of the rest of these lectures is devoted to it. I mention the uncertainty in Griffin's account just so that we do not have too simple a picture of dignity as a foundation. A status account will present dignity (however defined) as foundation-*ish* (or, as we might say, foundation*al*) but it may not be a foundation in the simple way that (for example) the major value-premises of a consequential argument are a foundation of everything else in the consequentialist's moral theory.

4. *Dignity and Bearing*

We place a high value on human dignity, but height can be understood in different ways. We might just mean that dignity counts for more than other values. Or height might mean something like rank. Consider again the idea of status. Some legal statuses are low and servile, like slavery and villeinage (or, in the modern world, felony or bankruptcy). Others are quite "high," like royalty or nobility. "Highness," here, is not like moral weight (as in the moral weight of a particularly prolonged or intense episode of pleasure for the purposes of Jeremy Bentham's felicific calculus). It is more a matter of rank, and it conveys things like authority and deference.

The high character of dignity also has physical connotations—a sort of "moral orthopedics of human dignity"—what some Marxists, following Ernst Bloch, used to call "walking upright."[25] Dignity has resonances of something like noble bearing. In one of the meanings the *Oxford English Dictionary* ascribes to the term, it connotes "befitting elevation of aspect, manner, or style;...stateliness, gravity." When we hear the claim that someone has dignity,

what comes to mind are ideas such as: having a certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation as someone to be reckoned with; not being abject, pitiable, distressed, or overly submissive in circumstances of adversity.[26]

These connotations resonate with what I called earlier the retail use of "dignity" in humanitarian law and human rights covenants. The ban on degrading treatment can be read as requiring that people must be permitted to present themselves (even in detention, even in the power of the police) with a modicum of self-control and self-possession.[27] I think it is a good thing in a philosophic account of dignity, not just to unite the retail and the wholesale uses of "dignity" in the law, but to do so in a way that makes illuminating sense of these intuitions about moral orthopedics. A good account of human dignity will explain it as a very general status. But it will also generate an account of it as noble bearing and an account of the importance of the ban on humiliating and degrading treatment. That is what I am trying to do with an account of dignity as a high-ranking status, comparable to a rank of nobility—only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man.

5. *Stipulative Uses of "Dignity"*

Some philosophers' definitions of "dignity" seem quite unrelated to these themes of nobility, bearing, and nondegradation. Consider, for example, Ronald Dworkin's use of "dignity" in his book *Is Democracy Possible Here?* At the beginning of that work, Dworkin states two principles that he says "identify…abstract value in the human situation."[28] One has to do with the objective value of a human life. The other states that each person has a special responsibility for how his or her own life goes. Dworkin says: "These two principles…together define the basis and conditions of human dignity, and I shall therefore refer to them as principles or dimensions of dignity."[29] He says, quite rightly, that these principles reflect values that are deeply embedded in Western political theory. They have not always been labeled "principles of dignity," but of course there is no objection to calling them that, if this is what Dworkin wants to do. However, he nowhere suggests that the "dignity" label adds any illumination to the principles, and his elaboration of them is conducted in a way that does not rely on any specific connotations of the concept that we have noticed so far.[30]

We might just make the term mean what Dworkin says it means, by linguistic stipulation. But there is no particular reason why we should assign "dignity" to this task. Other words would do as well. We could use the word "glory," and talk about the inherent glory of the human being, respect for glory, humans having an inalienable right to glory, and so on. We would acknowledge of course that "glory" has some other connotations, which may or may not resonate with its use here, but we would say we were giving it new work to do, where it will stand for these two Dworkinian principles. I hope I will not be misunderstood as making fun of Dworkin's stipulation when I remind you that the word "glory" has a history of being used in his way.[31] It can be put to work in political philosophy just as Humpty Dumpty puts it to work in logic (as a term for a certain sort of argument). But we would have to pay it extra and it may turn out that "dignity" comes cheaper for this task, being more manageable and less temperamental.

6. *Kant*

Dworkin is in good company, for the account that I am going to give is also at odds with one of the best-known philosophical theories: the definition of dignity in Immanuel Kant's *Groundwork of the Metaphysics of Morals*:

In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what, on the other hand, is raised above all price and therefore admits of no equivalent has a dignity. Now, morality is the condition under which alone a rational being can be an end in itself....Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.[32]

The first thing to say about this definition is that "dignity" here is the English translator's term, not Kant's. Kant uses the German term *Würde*. There is a well-established practice of translating *Würde* as "dignity." But the two words have slightly different connotations.[33] *Würde* is much closer to "worth" than our term "dignity" is.

The second thing to say is that although *value beyond price* and *the intrinsic nonnegotiable nonfungible worth that inheres in every human being in virtue of his or her moral capacity* are wonderful and important ideas, there is no particular reason to use our term "dignity" to convey them. *Würde*, in sense of the passage in Kant's *Groundwork*, expresses a type of value or a fact about value. "Dignity," by contrast, conveys the idea of a type of status that a person may have. The distinction may seem a fine one, particularly if we acknowledge that in moral theory a person's status can derive from an estimation of that person's fundamental worth.[34] A person may have dignity (in the sense that interests us) because he or she has worth (or *Würde* in Kant's sense): but this is genuine derivation, not synonymy. We can distinguish the ideas also in terms of appropriate responses to value and status, respectively.[35] The thing to do with something of value is promote it or protect it, perhaps maximize things of that kind, at any rate to treasure it. The thing to do with a ranking status is to respect and defer to the person who bears it. It is important not to elide this difference.

Now Kant does also say that the basis of human worth commands respect. But this is not exactly respect for persons.[36] What commands respect on Kant's account is the capacity for morality; and I agree with Michael Rosen that this is a sort of Platonism;[37] it

involves respecting something within a person, not a person himself or herself. Our respect for the workings of the moral law within ourselves is subjectively a sort of quivering awe at the way the moral law can strike down our inclinations.[38] Rosen argues that it is a quasi-aesthetic ideal, and I am inclined to agree with him.

I am sure there are some readers who will regard my turning my back on the conception of dignity in the *Groundwork* as a reductio ad absurdum of my whole enterprise. "If not Kant, then who?"—they will ask. But Kant's use of dignity (or *Würde*) is complicated. He does also use the term in ways that line up much more closely to the traditional connotations of nobility that we have been talking about. In his political philosophy, Kant talks of "the distribution of dignities." He describes nobility as a dignity that "makes its possessors members of a higher estate even without any special services on their part." And he says that "no human being can be without any dignity, since he at least has the dignity of a citizen."[39] These sayings associate dignity with rank in more or less exactly the way that I want to associate them.

Additionally, *The Metaphysics of Morals* contains a long, priggish passage "On Servility," where Kant talks of our "duty with reference to the dignity of humanity within us":

> Be no man's lackey.—Do not let others tread with impunity on your rights.—Contract no debt for which you cannot give full security.—Do not accept favors you could do without....Complaining and whining, even crying out in bodily pain, is unworthy of you, especially if you are aware of having deserved it....Kneeling down or prostrating oneself on the ground, even to show your veneration for heavenly objects, is contrary to the dignity of humanity....Bowing and scraping before a human being seems in any case unworthy of a human being.[40]

This Polonius-like account of dignified bearing sounds like the sort of thing I am pursuing. But the challenge is to connect all this back to what dignity is said in the *Groundwork* to be: namely, value beyond price. That is what I have trouble with. There is no doubt that Kant has

some such connection in mind. The "absolute inner worth" of our moral personality begins as a basis of self-esteem, but it is also a sort of asset by which a person "exacts respect for himself from all other rational beings in the world" and measures himself "on a footing of equality with them."[41] Stephen Darwall makes much of this passage in a recent book.[42] He believes that there is an important conception of dignity to be found in Kant's work that has much more to do with the way we elicit respect for ourselves from others by making what he calls "second-person" demands on them, than with any notion of the objective preciousness of our moral capacity. Darwall, though, is reluctant to give up on the *Groundwork* definition. He pays lip service to it. He says that the moral requirements that interest him "structure and give expression to the distinctive value that persons equally have: dignity, a 'worth that has no price.'"[43] But I believe that last expression is a wheel that turns nothing in Darwall's account. Everything has to do with the generation of respect through second-person demands. "Worth beyond price" is just decoration.

A more promising approach is indicated in a recent paper by Elizabeth Anderson.[44] Anderson explores the notion of "commanding value," which if it works may bridge the gap between dignity as value-beyond-price and dignity as rank or authority. She is interested in the way Kant appropriated and transformed contemporary ideas about honor: a man of honor treats his independence and self-esteem as something above price; he would not trade it for anything in the world, certainly not for the sake of material interest. This bridges exactly the gap that I am worrying about. And in her view Kant's transformation of it is precisely a universalization of the ethic of honor.[45] If Professor Anderson is right about this, then I should rethink my claim that the famous *Groundwork* definition has little to offer the modern jurisprudence of dignity.

I should repeat that I have no doubt about the importance of the ideas that Kant associates with "dignity" in the *Groundwork* definition: fundamental worth or value beyond price, the insistence that human persons are not to be traded off against each other. But,

taken on its own, it has had a deplorable influence on philosophical discussions of dignity and it has led many legal scholars to just assume that "dignity" in the law must convey this specific Kantian resonance.[46] Kant's later work does indeed accord with the idea of dignity as a ranking status. But not the *Groundwork*'s fundamental equation of *Würde* with "value beyond price," at least not without the elaboration that Elizabeth Anderson has offered.

I will have more to say in a moment about conceptions that equate human dignity with the worth or sacred value of human life. Before I do, let me cite one example of the legal use of a Kantian conception of dignity as a simple conception of human worth precluding trade-offs. In a well-known case, the Constitutional Court of Germany considered a statute passed in the wake of the 9/11 terrorist attacks, permitting the German air force to shoot down airliners that had been taken over by terrorists. The German Constitutional Court held that this was not compatible with Article 1 of the Basic Law, which says that "[h]uman dignity is inviolable." Under the Article 1 guarantee of dignity, it is "absolutely inconceivable," said the Court, "to intentionally kill ... the crew and the passengers of a hijacked plane, even when they are in a situation that is hopeless for them," that is, even when they are "doomed anyway."[47] "[H]uman dignity," the Court went on, "enjoy[s] the same constitutional protection regardless of the duration of the physical existence of the individual human being." It is an admirable and brave decision, and it may be right. But it takes "dignity" in a direction that leaves behind many of its familiar connotations.

7. *Roman Catholic Teaching on Human Dignity*

There are "absolute worth" accounts of dignity and there are "ranking status" accounts. I favor the second, but right now I am trying

to do justice to the first, at least in the currency of the scarce time available for this lecture. So here is another well-known conception on the "absolute worth" side of things.

Roman Catholic social teaching about the sanctity of life, about the absolute worth of each human life (starting from conception), and about the absolute character of the prohibitions on murder, abortion, euthanasia, and scientific exploitation of embryos is sometimes expressed using the term "dignity."[48] We are told of the "sublime" and "almost divine dignity" of every human being, "based on the intimate bond which unites him to his Creator."[49] We are told that "human beings have a special type of *dignity* which is the basis for…the obligation all of us have not to kill them."[50] This theme is particularly familiar from Roman Catholic doctrine concerning abortion, which cites "the dignity of the unborn child" as the basis for an absolute prohibition on abortion,[51] and holds also that "the use of human embryos or fetuses as an object of experimentation constitutes a crime against their dignity as human beings."[52] What can we make of this?

The view that I take is similar to my view of Kant's definition of *Würde* in the *Groundwork*. I do not understand why "dignity"—with its distinctive connotations—is a good term to use to do work that might be done as well by "worth" or "sacred worth." Having said that, I am quite aware that nothing I say here will persuade Catholics or Kantians to adopt different terminology.

Also, the Catholic account does not altogether ignore alternative approaches to dignity. The sort of conception I am developing in these lectures presents dignity as a rank or status that a person may occupy in society, display in his bearing and self-presentation, and exhibit in his speech and actions. But what about the dignity of those who cannot control their self-presentation or cannot speak up for themselves? John Paul II's encyclical *Evangelium Vitae* condemns "the mentality which equates personal dignity with a capacity for verbal and explicit…communication."

> [O]n the basis of these presuppositions there is no place in the world for anyone who, like the unborn or the dying, is a weak element in the social structure, or for anyone who appears completely at the mercy of others and radically dependent on them, and can only communicate through the silent language of a profound sharing of affection.[53]

The critique is a little overstated. Dignitary provisions, as I understand them, are particularly important for those who are completely at the mercy of others. But I think the former pope was referring to those who are incapable of speaking for themselves or controlling their self-presentation even if they were permitted to: infants and the profoundly disabled. But we should not assume that dignity is the only value in play. I have been at pains to stress that a conception like the one I have been developing does not in any way preclude the independent operation of a principle of the sacred value of all human life.

Certainly we do have to give an account of how human dignity applies to infants and to the profoundly disabled. My own view is that this concern should not necessarily shift us away from a conception that involves the active exercise of a legally defined status. But it does require attention. I believe it can be addressed by the sort of structure that John Locke introduced into his theory of natural rights, when he said of the rank of equality that applies to all humans in virtue of their rationality: "Children, I confess, are not born *in* this full state of equality, though they are born *to* it."[54] Like heirs to an aristocratic title, their present status looks to a rank that they *will* occupy (or are destined to occupy); but it does not require us to invent a different sort of dignity for them in the meantime.

Nothing I have said is intended to refute or cast doubt on the Roman Catholic position regarding the sanctity of life, any more than my critique of Kant casts doubt on his view in the *Groundwork* about trade-offs. We are arguing here about what "dignity" means, not about the permissibility of abortion. And I certainly do not think that any of this shows that dignity (whether in the Catholics' hands or in general) is a stupid or useless concept. Stephen

Pinker and Ruth Macklin say it does.[55] But they say this just because they are annoyed that Catholics and other "theocons" oppose substantive positions (e.g., about stem-cell experimentation) that Pinker and Macklin support and because they fear that the word "dignity" might intensify that opposition. Pinker and Macklin are not really interested in the analysis of dignity. They oppose the Catholic use of the word because they are politically annoyed by the positions it conveys. They have little interest in what "dignity" might mean if it were not associated with such opposition to abortion or stem-cell research or whatever.

8. *Rank and Hierarchy*

As I have hinted a couple of times, my own view of dignity is that we should contrive to keep faith somehow with its ancient connection to noble rank or high office. In Roman usage, *dignitas* embodied the idea of the honor, the privileges, and the deference due to rank or office,[56] perhaps also reflecting one's distinction in holding that rank or office. Of course Latin *dignitas* does not necessarily equal English "dignity" any more than Kantian *Würde* does. But for the term "dignity" the *Oxford English Dictionary* gives as its second meaning "[h]onourable or high estate, position, or estimation; honour; degree of estimation, rank" and as its third meaning "[a]n honourable office, rank, or title; a high official or titular position."[57]

So people would talk about the dignity of the monarch. A 1690 indictment for high treason against a Jacobite spoke of an "intent to depose the King and Queen, and deprive them of their Royal dignity, and restore the late King James to the government of this kingdom."[58] Blackstone tells us that "the ancient jewels of the Crown are held to be...necessary to maintain the state, and support the dignity, of the sovereign for the time being."[59] And the 1399 statute that took the crown from off the head of Richard II

stated that he "renounsed and cessed of the State of Kyng, and of Lordeshipp and of all the Dignite and Wirsshipp that longed therto."[60]

It is not just monarchy. Kant talks about the various dignities of the nobility.[61] In England, nobles had dignity, in the order of duke, marquis, earl, viscount, baron.[62] Degrees have dignity according to law; certainly a doctorate does.[63] Clergymen have dignity, or some do;[64] and a bishop has higher dignity than an abbot.[65] Ambassadors have dignity according to the law of nations.[66] And the French Declaration of the Rights of Man and of the Citizen, approved by the National Assembly in 1789, says in Article 6 that "[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."

Now, this equation of dignity and rank may seem an unpromising idea for human rights discourse, inasmuch as human rights ideology is associated specifically with the *denial* that humans have inherent ranks distinguishing some of them as worthy of special dignity in the way that a duke or a countess might be.[67] However, I am reluctant to leave the matter there. I suspect that this *ranking* sense of "dignity" offers something more to an egalitarian theory of rights than meets the eye.

It might be thought that the old connection between dignity and rank was superseded by a Judeo-Christian notion of the dignity of humanity as such, and that this Judeo-Christian notion is really quite different in character. I am not convinced. I don't want to underestimate the breach between Roman-Greek and Judeo-Christian ideas,[68] but I believe that as far as dignity is concerned the connotation of ranking status remained, and that what happened was that it was transvalued rather than superseded.[69] So let us explore some ways in which the idea of noble rank may be made compatible with an egalitarian conception of dignity.

I said a few moments ago that the Roman Catholic equation of dignity with sacredness of life seems quite different from the idea of dignity as status. Yet when you think about it, the Catholic notion is not unconnected with rank. When we talk about *human* dignity, we may be saying something about rank but not about the rank of some humans over others. We may be talking about rank of humans generally in the great chain of being. The dictionary cites Richard Hooker as writing in *Ecclesiastical Polity* about stones' being "in dignitie of nature inferior to plants."[70] Well, presumably in this ranking, plants are in turn inferior in dignity to beasts, and beasts are inferior to humans, and humans are inferior to angels, and all of them of course are inferior in dignity to God. Catholic dignitary teaching continues to draw on this idea of the special rank accorded to all humans in the great chain of being. Unlike the lower beings, each of us is made in the image of God and each of us bears a special dignity in virtue of that fact.[71]

It is often a striking implication of this sort of ranking that *within* each rank, everything is equal. This has been hugely important for theories of human equality (in John Locke's work, for example).[72] Humans rank higher than other creatures because, with reason and free will, they have God's special favor and are created in his image; this is a rank in which each of us shares, without distinction or discrimination.

Or picture this. In an earlier article on "Dignity and Rank,"[73] I mentioned a certain *transvaluation of values* that seems to have happened in late-eighteenth-century romantic poetry. One begins with an idea of dignity associated with the high rank of some humans (compared to others), and then one *reverses* that ordering ironically or provocatively to claim that the high rank of some is superficial or bogus and that it is the lowly man or the virtues of very ordinary humanity that enjoy true dignity. The *Oxford English Dictionary* cites a passage from William Wordsworth to illustrate this: "True dignity abides with him alone, [w]ho, in the silent hour of inward thought, [c]an still suspect, and still revere himself, [i]n lowliness of heart." But Robert Burns is the real master of this move, with the remarkable reversal of rank/dignity in the three central stanzas of "For A' That and For A' That."

A prince can mak a belted knight,
A marquis, duke, an' a' that;
But an honest man's abon his might,
Gude faith, he maunna fa' that!
For a' that, an' a' that,
Their dignities an' a' that;
The pith o' sense, an' pride o' worth,
Are higher rank than a' that.

Burns looks forward to a time when "Sense and Worth, o'er a' the earth, / Shall bear the gree, an' a' that." And then follows the great peroration of human brotherhood, founded on this equality: "For a' that, an' a' that, / It's coming yet for a' that, / That Man to Man, the world o'er, / Shall brothers be for a' that."

The use of "dignity" in this poetry is but an instance of a broader transvaluation that I believe has taken place with regard to dignity generally: a sea change in the way "dignity" is used, enabling it to become a leading concept of *universal* rights (as opposed to special privileges), and bringing into the realm of rights what James Whitman has called "an extension of formerly high-status treatment to all sectors of the population."[74] But we see this only if we understand the *dynamics* of the movement between modern notions of human dignity and an older notion of rank. The older notion is not obliterated; it is precisely the resources of the older notion that are put to work in the new.

So that is my hypothesis: the modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.

9. *Rank and Equal Rights*

Something like this was noticed many years ago by Gregory Vlastos in a neglected essay, "Justice and Equality."[75] In a discussion of equality and rights, Vlastos argued that we organize ourselves not like a society without nobility or rank, but like an aristocratic society that has just one rank (and a pretty high rank at that) for all of us. Or (to vary the image slightly), we are not like a society that has eschewed all talk of caste; we are like a caste society with just one caste (and a very high caste at that). Every man a Brahmin.[76] Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege. I take the Vlastos suggestion very seriously indeed. If he is right, then we can use aspects of the traditional meaning of dignity associated with high or noble rank, to cast light on our conceptions of human rights.

Think, for example, of the change that comes when one views an assault on an ordinary man or woman not just as a crude physical interference, but as a sort of sacrilege (like assaulting a prince or a duke). It is a salutary recharacterization of this familiar right, for it reminds us that a dignitarian attitude towards the bodies of others is one of sacral respect, not just nonchalant forbearance. Or think of the proverbial saying "An Englishman's home is his castle." That too reflects something of the generalization of rank. The idea is that we are to live secure in our homes, with all the normative force that a noble's habitation of his ancestral fortress might entail. The modesty of our dwellings does not signify that the right of privacy or security against incursion, search, or seizure is any less momentous.

Or consider, as a third example, the rights of prisoners of war, and the insistence in Common Article 3 of the Geneva Conventions that "outrages upon personal dignity, in particular humiliating and degrading treatment," shall be prohibited. In ages past, chivalry might require that noble warriors, such as knights, be treated with dignity when they fell into the hands of hostile powers; but this was hardly expected in the treatment of the common soldier; they were abused and probably slaughtered. Traces of differential dignity remain: you may remember Colonel Nicholson (played by Alec Guinness) in the David Lean movie *The Bridge on the River Kwai*, who insisted to the Japanese commander of a prisoner-of-war camp that he and his officers were exempt by the laws of war from manual labor, even though the private soldiers under his command might legitimately be forced to work.[77] But modern prohibitions on degrading treatment are oriented specifically to the common soldier, the ordinary detainee, solicitous of their dignity in ways that would have been inconceivable in times past for anyone but officers and gentlemen. (I do not have to remind you how fragile this change is and how close we have come in recent practices of detention in the war on terror to a frightening leveling-down, as we characterize the extension of formerly high-status treatment to all detainees as "quaint and obsolete." I shall say more about these unpleasant realities at the end of my second lecture. For now, it is important to remember that, in these lectures, we are exploring the shape of a *normative* universe, which may or may not succeed in governing or modifying all aspects of our practice. This is as true in law as it is in morality.)

No doubt there are some aristocratic privileges that cannot be universalized, cannot be extended to all men and women. Some we would not want to universalize: a *droit du seigneur*, for example, in matrimonial relations. And some when they are extended will change their character somewhat: a nobleman might insist as a matter of dignity on a right to be consulted, a right to have his voice reckoned with and counted in great affairs of state; if we generalize this—and *really* generalize it—giving *everyone* a right to have his or her voice reckoned with and counted in great affairs of state, then what was formally a high and haughty

prerogative might come to seem as mundane as the ordinary democratic vote accorded to tens of millions of citizens. And citizens sometimes complain that their votes are meaningless, and philosophers support them in this complaint.[78] But the dignity hypothesis reminds us that, although it is shared with millions of others, this vote is not a little thing. It too can be understood in a more momentous way, as the entitlement of each person, as part of his or her dignity as an (equal) peer of the realm, to be consulted in public affairs.

I think all this is tremendously helpful in deepening our talk of human dignity and enriching our understanding of rights. The idea that both notions are connected with ideas of status, and with the transvaluation of older notions of rank, is a stimulating one. In my second lecture, I want to say more about the way status works in law, and more too about how the law defines a powerful dignity for us all, in ways that enable us to define a distinctive dignitarian content for the ideal of equality before the law.

Notes

1. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in Immanuel Kant, *Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), at pp. 84–85 (4:435 of the Prussian Academy Edition of Kant's *works*); Stephen Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (Cambridge: Harvard University Press, 2006); James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

2. Basic Law (*Grundgesetz*), for the Federal Republic of Germany, Article 1 (1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Constitution of South Africa, Article 10: "Everyone has inherent dignity and the right to have their dignity respected and protected." ICCPR, Article 10 (1): "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

3. A good start, albeit a moderately skeptical one, would be Christopher McCrudden's fine essay, "Human Dignity in Human Rights Interpretation," *European Journal of International Law* 19 (2008): 655–724.

4. For the idea of status in law, see R. H. Graveson, *Status in the Common Law* (London: Athlone Press, 1953). See also the discussion in section 6 of Lecture 2.

5. Much of the argument in this first lecture is based on my essay "Dignity and Rank," *European Journal of Sociology* 48 (2007): 201–37. But I have modified the positions taken in that essay in a number of ways.

6. Wesley N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

7. Even if we say in our model-theoretic conceptions that natural rights precede legal rights in the order of coming-into-being (in Lockean social contract theory, for example), still we should not infer that this corresponds to the order of our understanding of rights, with natural rights being understood first in a way that is independent of any legal understanding.

8. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

9. Cf. Oscar Schachter, "Human Dignity as a Normative Concept," *American Journal of International Law* 77 (1983): 848–54, at p. 849: "We do not find an explicit definition of the expression 'dignity of the human person' in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors."

10. Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper Perennial, 1962), pp. 269 ff.

11. I have pursued this suggestion in Jeremy Waldron, "The Dignity of Groups," *Acta Juridica* (Cape Town) (2009): 66–90, at pp. 68–74.

12. Stephen Pinker thinks it is. In "The Stupidity of Dignity," *New Republic* May 28, 2008, available at http://www.tnr.com/article/the-stupidity-dignity, he complains that the concept "spawns outright contradictions at every turn. We read that slavery and degradation are morally wrong because they take someone's dignity away. But we also read that nothing you can do to a person, including enslaving or degrading him, can take his dignity away."

13. See Jeremy Bentham, *Anarchical Fallacies*, in *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron (London: Methuen, 1987), p. 74.

14. Ibid., p. 50.

15. Geneva Conventions, Common Article 3. See also Rome Statute of the International Criminal Court, Article 8 (2) (b) xxi.

16. Constitution of Poland, Article 178(2). The relation between remuneration, subsistence, and dignity is an interesting one. In England it was sometimes held that an impoverished aristocrat could not maintain his dignity. *The Earl of Shrewsbury's Case*, 12 Co. Rep. 106, 77 Eng. Rep. 1383 (1612) cites the terms of an act of Parliament in the reign of Edward IV for the formal degradation of George Nevill, Duke of Bedford: "And forasmuch as it is openly known, that the said George hath not, or by inheritance may have any livelihood to support the same name, estate, and dignity, or any name of estate; and oftentimes it is to be seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it...causeth oftentimes great extortion, imbracery and maintenance to be had, to the great trouble of all such countries where such estate shall happen to be: wherefore the King by advice of his Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled,...ordaineth, establisheth, and enacteth, that from henceforth the same creation and making of the said duke, and all the names of dignity given to the said George...be from henceforth void and of none effect."

17. Universal Declaration of Human Rights (1948), Article 23 (3). See also John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), p. 277 (II, § 15): "[F]or as much as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our Nature doth desire, *a life fit for the dignity of man*, therefore to supply those defects and imperfections which are in us, as living single and solely by ourselves, we are naturally induced to seek communion and fellowship with others" (my emphasis).

18. See also Daniel Statman, "Humiliation, Dignity, and Self-Respect," in *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer and Eckart Klein (New York: Kluwer Law International, 2002): 209–29, p. 209: "Tying the concept of humiliation to that of human dignity makes the former too philosophical...and too detached from psychological research and theory."

19. The Universal Declaration of Human Rights (Article 5) and the ICCPR (Article 7) both provide that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."

20. Hannah Arendt, *On Revolution* (Harmondsworth: Penguin, 1977), p. 278.

21. Griffin, *On Human Rights*, p. 31, drawing on Giovanni Pico della Mirandola, *Oration on the Dignity of Man* (1486), available at http://cscs.umich.edu/~crshalizi/Mirandola/.

22. Griffin, *On Human Rights*, p. 152.

23. Ibid., pp. 179–80.

24. Ibid., pp. 149 ff.

25. See Jan Robert Bloch and Caspers Rubin, "How Can We Understand the Bends in the Upright Gait?" *New German Critique* 45 (1988): 9–39, at pp. 9–10.

26. See also the account in Aurel Kolnai, "Dignity," *Philosophy* 51 (1976): 251–71, at pp. 253–54.

27. See Jeremy Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves," *Canadian Journal of Law and Jurisprudence* 23 (2010): 269–86 (also in Jeremy Waldron, *Torture, Terror, and Trade-Offs* [New York: Oxford University Press, 2010]: 276–319) for the ways in which the bestialization or infantilization of detainees is at odds with this (in the "war on terror").

28. Ronald Dworkin, *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2008), p. 9. The account is greatly expanded in Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2010), pp. 191–218 *et passim*.

29. Dworkin, *Is Democracy Possible Here?* p. 10.

30. It is interesting that in his early work on rights, Dworkin distinguished his own position, which he articulated in terms of equality, from positions that he called Kantian, which were associated with dignity: see Dworkin, *Taking Rights Seriously*, pp. 198–99.

31. Cf. Lewis Carroll, *Through the Looking Glass, and What Alice Found There* (Philadelphia: Henry Altemus, 1899), p. 123.

32. Kant, *Groundwork*, pp. 84–85 (4:435 of the Prussian Academy Edition of Kant's works). Kant goes on to say that the moral will is "infinitely above all price." He says it cannot be brought into comparison or competition with any other value at all "without, as it were, assaulting its holiness." Notice also that James Griffin is wary of associating his view with Kantian dignity; he says that dignity in the Kantian sense is supposed to be characteristic of all morality, not just human rights (Griffin, *On Human Rights*, p. 201).

33. For a suggestive discussion of some differences, see Kolnai, "Dignity," at pp. 251–52. See also the comment in *Dignity—Ethics and Law: Bibliography* (Copenhagen: Centre for Ethics and Law, 1999), p. 9: "The Scandinavian and German nouns *vœdighed* and *Würde* are derived from the Germanic **werpa-* (*werd, wert*) which means that these languages point to worth and value more than to dignity."

34. McCrudden, "Human Dignity in Human Rights Interpretation," at p. 679, follows Gerald Neuman, "Human Dignity in United States Constitutional Law," in *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis*, ed. D. Simon and M. Weiss (Baden-Baden: Nomos, 2000), at pp. 249–50, in identifying the core meaning of "human dignity" with the intrinsic *worth* of the individual.

35. Kolnai's discussion of this in "Dignity," at pp. 252–54, is very fine.

36. Kantian respect, important though it is in his moral philosophy, is not really the right sort of shape for our purposes. In the Second Critique, Kant presents respect as a feeling of awe that a person experiences when he notices how pure practical reason strikes down his inclinations and his self-conceit. (See Immanuel Kant, *Critique of Practical Reason*, Part I, ch. 3, in *Practical Philosophy*, pp. 199 ff. [5:73 ff.].) It is like amazement and admiration that there should be this moral capacity, a response that I have to my own sense of duty. It is not independently a way of generating duties. Kant himself seems to recognize this because, as he puts it, "the concept of duty cannot be derived from respect" (ibid., p. 172 (5:38). Kant used the term "respect" very carefully. We tend to use it quite loosely, and we may be seeing in his account not what it strictly implies but what we need.

37. See Michel Rosen, "'The Shibboleth of All Empty-Headed Moralists': The Place of Dignity in Ethics and Politics," 2007 Boston University Benedict Lectures, now published as Dignity: Its History and Meaning (Cambridge: Harvard University Press, 2012).

38. In the *Critique of Practical Reason*, p. 200 (5:74), Kant says: "If something represented as a determining ground of our will humiliates us in our self-consciousness, it awakens respect for itself insofar as it is a positive and a determining ground. Therefore the moral law is even subjectively a ground of respect."

39. Immanuel Kant, *The Metaphysics of Morals*, in *Practical Philosophy*, pp. 470–72 (6:328–30).

40. Ibid., pp. 558–59 (6:436).

41. Ibid., pp. 557–58 (6:435–36): "[F]rom our capacity for internal lawgiving and from the (natural) human being's feeling himself compelled to revere the (moral) human being within his own person, at the same time there comes exaltation of the highest self-esteem, the feeling of his inner worth, in terms of which he is above any price and possesses an inalienable dignity, which instills in him respect for himself."

42. Darwall, *The Second-Person Standpoint*, ch. 6.

43. Ibid., p. 119.

44. See Elizabeth Anderson, "Emotions in Kant's Later Moral Philosophy: Honor and the Phenomenology of Moral Value," in *Kant's Ethics of Virtue*, ed. Monika Betzler (New York: de Gruyter, 2008): 123–46.

45. Ibid., p. 139: "The ethic of honor reserves respect, the status of being a bearer of commanding value…exclusively to people of superior social rank. [But] Kant's ethic universalizes respectful standing to all rational agents."

46. See, for example, Stephen J. Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), p. 39, simply defining dignity as "near absolute worth." See also Schachter, "Human Dignity as a Normative Concept," p. 849, equating dignity with "the Kantian injunction to treat every human being as an end not as a means," and G. P. Fletcher, "Human Dignity as a Constitutional Value," *University of Western Ontario Law Review* 22 (1984): 171–82.

47. *Bundesverfassungsgericht*, February 15, 2006, 115 BVerfGE 118, available at http://www.bundesverfassungsgericht.de/en/decisions/rs20060215_1bvr035705en.html. "[T]he assessment that the persons who are on board a plane that is intended to be used against other people's

lives...are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being....Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity."

48. See Pope John Paul II's encyclical *Evangelium Vitae* (March 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

49. Ibid., §§ 25, 34, and 38.

50. Patrick Lee and Robert George, "The Nature and Basis of Human Dignity," *Ratio Juris* 21 (2008): 173.

51. *Evangelium Vitae*, § 44.

52. Ibid., §63. For discussion, see also *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington D.C., 2008), available at http://www.bioethics.gov/reports/human_ dignity /index.html.

53. *Evangelium Vitae*, § 19.

54. Locke, *Two Treatises*, p. 304 (II, § 55).

55. Stephen Pinker says that "'dignity' is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it." He adds: "The sickness in theocon bioethics [involves] imposing a Catholic agenda on a secular democracy and using 'dignity' to condemn anything that gives someone the creeps." See Pinker, "The Stupidity of Dignity" and also Ruth Macklin, "Editorial: Dignity Is a Useless Concept," *British Medical Journal* 327 (2003): 1419–20, at p. 1420.

56. See Teresa Iglesias, "Bedrock Truths and the Dignity of the Individual," *Logos: A Journal of Catholic Thought and Culture* 4 (2001): 114–34, at pp. 120–21: "The idea of *dignitas* was central to Roman political and social life and closely related to the meaning of honor. Political offices, and as a consequence the persons holding them, like that of a senator, or the emperor, had *dignitas*."

57. Samuel Johnson defined dignity as "a rank of elevation" in *A Dictionary of the English Language*, cited by Michael Meyer in "Dignity as a (Modern) Virtue," in Kretzmer and Klein, *The Concept of Human Dignity*: 195–207, at p. 196.

58. *Patrick Harding's Case*, 86 Eng. Rep. 461, 2 Ventris, 315. And a felony would be said to be committed "against the peace of our...Lord the King, his crown and dignity."

59. Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England* (London: Cavendish Publishing, 2001), 2:347 (ch. 28).

60. 1399 Rolls Parl. III. 424/1, as cited in the *Oxford English Dictionary*'s entry for "dignity."

61. Kant, *Metaphysics of Morals*, p. 471 (6:330).

62. Morrison, *Blackstone's Commentaries on the Laws of England*, 1:30–35 (ch. 12).

63. *Doctor Bentley's Case*, 92 Eng. Rep. 818, Fortescue, 202 (1737).

64. Though not all holy orders are technically dignities. See Boughton v. Gousley, Cro. Eliz. 663 78 Eng. Rep. 901 (1599): "The civilians divided spiritual functions into three degrees. First, a function, which hath a jurisdiction; as bishop, dean, &c. Secondly, a spiritual administration, with a cure; as parson of a church, &c. Thirdly, they who have neither cure nor jurisdiction; as prebends, chaplains, &c. And they defined a dignity to be *administratio ecclesiastica cum jurisdictione, vel potestate conjunctd*, and thereby they exclude the two last degrees from being any dignity;...an archdeacon is not a name of dignity:...a parson is not a name of dignity....a provost is not a name of dignity....a precentor is not a name of dignity....a chaplain is not a name of dignity."

65. *Cootes v. Atkinson*, 75 Eng. Rep. 1072, Gouldsborough, 171.

66. *Taylor v. Best*, 139 Eng. Rep. 201, 14 C. B. 487.

67. In America, for example, we associate the egalitarian rights-talk of (say) the opening lines of the Declaration of Independence with the Constitution's insistence in Article 1: 9 (viii) that "[n]o title of nobility shall be granted by the United States."

68. See, for example, Joshua A. Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford: Oxford University Press, 2008).

69. Even those who think in terms of a fundamental opposition between the rank notion of dignity and the human rights notion of dignity also discern a dynamic connection. Iglesias, "Bedrock Truths," p. 120, distinguishes between what she calls the universal and the restricted meanings of dignity. She writes: "Consulting the dictionary we can find that the term 'dignity' connotes 'superiority,' and the 'decorum' relating to it, in two basic senses. One refers to superiority of role either in rank, office, excellence, power, etc., which can pertain only to *some* human beings....The other refers to the superiority of intrinsic worth of every human being that is independent of external conditions of office, rank, etc. and that pertains to *everyone*. In this universal sense the word 'dignity' captures the mode of being specific to the human being *as* a human being. This latter meaning, then, has a universal and unconditional significance, in contrast with the former that is restrictive and role-determined." Iglesias associates the restrictive use with classical Roman culture and the universal use with notions of inherent human worth that emerged in Jewish ethics and theology. But though, as she says, "the meaning of dignity has been historically marked, up to the present time, by a tension between its universal and its restrictive meanings," what has happened is that "historically, the restrictive Roman meaning of *dignitas* assigned to office and rank, and used as a discriminatory legal measure, began to be used with a new meaning of universal significance that captures the equal worth of everyone" (p. 122).

70. The OED citation is as follows: "1594 HOOKER Eccl. Pol. I. vi. (1611) 12 Stones, though in dignitie of nature inferior to plants."

71. See Jeremy Waldron, "The Image of God: Rights, Reason, and Order," in *Christianity and Human Rights: An Introduction*, ed. John Witte and Frank Alexander (New York: Cambridge University Press, 2010).

72. Locke, *Two Treatises*, pp. 269–71(II, §§ 4 and 6) wrote that there is "nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection...[B]eing furnished with like faculties,...there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours."

73. Waldron, "Dignity and Rank," p. 220.

74. James Whitman, "Human Dignity in Europe and the United States: The Social Foundations," in *Europe and US Constitutionalism*, ed. G. Nolte (New York: Cambridge University Press, 2005): 108–24, at p. 110 argues that "[t]he core idea of 'human dignity' in Continental Europe is that old forms of low-status treatment are no longer acceptable....'Human dignity,' as we find it on the Continent today, has been formed by a pattern of leveling up, an extension of formerly high-status treatment to all sectors of the population."

75. Gregory Vlastos, "Justice and Equality," in *Theories of Rights*, ed. Jeremy Waldron (New York: Oxford University Press, 1984): 41–76.

76. Ibid., p. 54. Vlastos continues: "To reproduce this feature of our system we would have to look not only to caste-societies, but to extremely rigid ones, since most of them make some provision for elevation in rank for rare merit or degradation for extreme demerit....And the fact that first-class citizenship, having been made common, is no longer a mark of distinction does not trivialize the privileges it entails. It is the simple truth, not declamation, to speak of it, as I have done, as a 'rank of dignity' in some ways comparable to that enjoyed by hereditary nobilities of the past."

77. David Lean, *The Bridge on the River Kwai* (Columbia Pictures, 1957). Colonel Nicholson clearly believes that forcing the officers to work would be degrading, and he suffers a great deal as a result of the Japanese reaction to his refusal to accept this degrading treatment. Intriguing though this is, however, it is pretty clear that the reference to degrading treatment in the modern Geneva Conventions is not about insensitivity to military rank. It depends on an idea of dignity that is more egalitarian than that.

78. Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in *Constant: Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988): 307–28, at p. 316, gives voice to this concern when he contrasts the participatory rights of the ancients with those of modern suffrage: "The share which in antiquity everyone held in national sovereignty was by no means an abstract presumption as it is in our own day. The will of each individual had real influence: the exercise of this will was a vivid and repeated pleasure....This compensation no longer exists for us today. Lost in the

multitude, the individual can almost never perceive the influence he exercises. Never does his will impress itself upon the whole; nothing confirms in his eyes his own cooperation." But maybe the better view is that of Judge Learned Hand, quoted in Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), p. 343, who contemplated the possibility of being "ruled by a bevy of Platonic Guardians":

> I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."

Lecture 2: Law, Dignity, and Self-Control

In the first lecture, I toyed with the idea that "dignity" is a term used to indicate a high-ranking legal, political, and social status, and that the idea of *human* dignity is the idea of the assignment of such a high-ranking status to everyone. We know that human dignity can be treated as a moral concept. But I was also pursuing a hunch that we might do better by considering first how dignity works as a legal concept—and then model what we want to do with it morally on that. I argued that we should consider ways in which the idea of human dignity keeps faith with the old hierarchical system of dignity as noble or official rank and that we should view it in its modern form as an equalization of high status rather than as something that eschews talk of status altogether. In my second lecture, I want to pursue this further by considering the variety of ways in which law vindicates dignity in this sense.

1. *Protecting Status*

Historically law has done all sorts of things to protect and vindicate dignity in the sense of rank or high status. English law protected nobles against imputations against their dignity by the offense (and tort) of *scandalum magnatum*.[1] It also protected the exclusiveness of rank with things like sumptuary laws, and requirements of proper address, deference, privilege, and precedence. If I am right that dignity is still the name of a rank—only now an equally

distributed one—and that this is a different matter from there being no rank at all in the law, then we would expect modern law also to commit itself to protection and vindication of the high rank or dignity of the ordinary person. And so it does, in various ways.

We have seen that law tries to protect individuals against treatment that is degrading.[2] That is one very elementary way in which law protects dignity. Another is protection from insult—a sort of democratized *scandalum magnatum*. In countries where hate speech and group libel are prohibited, people are required to refrain from the most egregious public attacks on one another's basic social standing. A great many countries use their laws to protect ethnic and racial groups from threatening, abusive, or insulting publications calculated to bring them into public contempt.[3] The United States is an exception in the latitude it currently gives to hate speech; but even here the notion of a dignitarian basis for banning hate speech is often cited in the constitutional debate, where it is understood as posing a freedom-versus-dignity dilemma.[4] Elsewhere these restrictions are not widely viewed as violations of individual rights; most countries say they have enacted them pursuant to their obligations under the International Covenant on Civil and Political Rights, which says that expressions of hatred likely to stir up violence, hostility, or discrimination *must* be prohibited by law.[5]

The other way that law protects dignity is by prohibiting invidious discrimination. This has been very important in South African jurisprudence.[6] According to the Constitutional Court, the history of the country demonstrates that discrimination "proceeds on [an] assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group." The Court went on: "Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as 'second class citizens.'"[7]

A similar approach has been taken in Canada. In a 1999 decision, it was said that "the purpose of [the antidiscrimination provisions of the Canadian Charter of Rights and Freedoms] is to prevent the violation of essential human dignity…through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[8] The Canadian court said that this "overriding concern" with dignity infuses all elements of the discrimination analysis and it figured that dignitarian ideas could be used to distinguish between invidious and benign discrimination.[9]

Mostly in this lecture I want to talk about some less obvious ways in which law protects dignity—ways, though, that are more pervasive and more intimately connected with the very nature of law. For when we think about something like Common Article 3 of the Geneva Conventions, it may strike us as a matter of contingency that dignity is protected in this way; we have seen in recent years how fragile the Geneva Conventions are. Or consider that in 2008, the Supreme Court of Canada decided it would no longer use dignity as the touchstone of its antidiscrimination doctrine.[10] It was persuaded by some academic writing that "human dignity is an abstract and subjective notion" that is "confusing and difficult to apply."[11] So it turned its back on dignity as the basis of antidiscrimination doctrine. Courts do that sometimes. They just decide to change the basis and direction of doctrine. Are there connections between law and dignity that are less contingent than this?

2. *The Dignity of Being a Right-Bearer*

One possibility is that even if jurisdictions vary in their readiness to acknowledge specific dignitary rights, still the very form and structure of a right conveys the idea of the right-bearer's dignity. Right-bearers stand up for themselves; they make unapologetic claims on their own behalf; they control the pursuit and prosecution

of their own grievances. In the words of Alan Gewirth, the ultimate purpose of rights

> is to secure for each person a certain fundamental moral status: that of having rational autonomy and dignity in the sense of being a self-controlling, self-developing agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.[12]

Rights reek of dignity, particularly in H. L. A. Hart's "choice theory" of rights, for example.[13] Hart was convinced that having a legal or a moral right was not just a matter of being the object of legal or moral concern; he rejected what is sometimes known as the "benefit theory" of rights associated with Jeremy Bentham. He favored instead the description of the right-bearer as having the power to determine what another's duty should be (in some regard):

> Y is...in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a right.[14]

Y (the right-bearer) can make a sort of demand upon X that X and the institutions of the law are required to pay attention to, and it may be that this is what Y's dignity amounts to. Hart developed this argument first for natural rights, but he thought (at least for a while) that it was true of legal rights too.[15]

Something similar can be found in Joel Feinberg's work on rights as claims: to have a right in law is to possess the dignity of a recognized claimant entitled to push his case before us and demand that it be considered.[16] A right, he says, is something that can be "demanded, claimed, insisted upon without embarrassment or shame."[17] Indeed Feinberg suggests that "what is called 'human dignity' may simply be the recognizable capacity to assert claims."[18] To the extent

that rights are pervasive in law, the recognition and respect that claimants are entitled to elicit is going to be a pervasive aspect of law's commitment to dignity.

It is sometimes said that we can imagine law without rights. If that means we can imagine law without any of the elements discussed in this section, I think it is false. Even if Hart and Feinberg are wrong about rights generally, law will nevertheless characteristically (not just contingently) establish and respect positions that have the features that their theories attributed to rights: for example, law will recognize potential plaintiffs and defer to their dignity in allowing *them* to make the decision whether some norm-violator is to be taken to task or not. It is even more evidently false if Ronald Dworkin is right in the basic "rights thesis" he set out years ago in *Taking Rights Seriously*. Dworkin argued that anyone making a case of any sort in law makes it in the tones and language of rights, in the mode of entitlement rather than request or lobbying. A party in law does not phrase his argument in terms of its being *a rather good idea* to require a defendant or respondent to pay such and such a sum of money; he stands on his rights and in recognizing this standing the law accords him the dignity of a right-bearer.

3. *Dignity and the "Inner Morality" of Law*

What about other internal connections between dignity and the forms and procedures of law? Well, we are familiar with something like this in the contrast between internal and external aspects of law's moral connections in the jurisprudence of Lon Fuller.

In his book *The Morality of Law*, Fuller developed an account of what he called the inner morality of law—the formal principles of generality, prospectivity, clarity, stability, consistency, whose observance is bound up with the basics of legal craftsmanship.[19] Legal positivists have sometimes expressed bewilderment

as to why Fuller called these internal principles a "morality."[20] He did so because he thought his eight principles had inherent moral significance. It was not only that he believed that observing them made it much more difficult to do substantive injustice; though this he did believe. It was also because he thought observing the principles he identified was itself a way of respecting human dignity:

> To embark on the enterprise of subjecting human conduct to rules involves...a commitment to the view that man is...a responsible agent, capable of understanding and following rules....Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey...your indifference to his powers of self-determination.[21]

These are not just platitudes. Fuller is referring here to a quite specific characteristic of law—its general reliance on what Henry Hart and Albert Sacks in *The Legal Process* called "self-application," people applying officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state.[22] Self-application is an important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, self-control, self-monitoring, and the modulation of their own behavior in regard to norms that they can grasp and understand. All this makes ruling by law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog. It is quite different too from eliciting a reflex recoil with a scream of command. A pervasive emphasis on self-application is, in my view, definitive of law, distinguishing it sharply from systems of rule that work primarily by manipulating, terrorizing, or galvanizing behavior.[23]

In an article published some years ago, Michael Meyer argued for a strong link between human dignity and the idea of self-control.[24] Meyer emphasized mainly the self-control involved in one's self-presentation to others. We talked about this in my first lecture, in regard to the noble bearing and self-possession that dignity expresses and protects. But self-command is more than just *setting one's stance*, as it were. It is also a matter of people fine-tuning their behavior effectively and gracefully in response to the legitimate demands that may be made upon them, controlling external behavior—monitoring it and modulating it in accordance with one's understanding of a norm.[25] This one might imagine as quintessentially aristocratic virtue, a form of self-command distinguished from the behavior of those who need to be driven by threats or the lash, or by forms of habituation that depend upon threats and the lash. But if it is an aristocratic virtue, it is one that law now expects to find in all sectors of the population.

One other point in this regard. Law does not always present itself to us as a set of crisply defined rules that are meant to be obeyed mechanically. Its demands often come to us in the form of standards—like the standard of "reasonable care"—norms that require, frame, and facilitate genuine thought in the way we receive and comply with them.

Some may wonder whether law can guide conduct (and be self-applying) if the indeterminacy of standards is not reduced to clear rules through official elaboration. But in many areas of life, law proceeds without such definitive elaboration. We operate on the basis that it is sometimes better to facilitate thoughtfulness about a certain type of situation ("When there is fog, drive at a *reasonable* speed") than to lay down an operationalized rule ("When visibility is reduced to less than a hundred meters, lower your speed by fifteen miles per hour"). And people respond to this. If standards rely necessarily on official elaboration, then the life of the law shows that ordinary people can sometimes have the dignity of judges. They do their own elaborations. They are their own officials: they recognize a norm, they apprehend its bearing on their conduct, and they make a determination and act on it.

4. *Hearings and Due Process*

Another way in which law respects the dignity of those who are governed is in the provision that it makes for hearings in cases where an official determination is necessary. These are cases where self-application is not possible or where there is a dispute that requires official resolution. By hearings, I mean formal events, like trials, tightly structured in a procedural way in order to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides. Those who are immediately concerned have an opportunity to make submissions and present evidence, and confront, examine, and respond to evidence and submissions presented from the other side. Not only that, but both sides are listened to by a tribunal that is bound to respond to the arguments put forward in the reasons that it eventually gives for its decision.[26]

Law, we can say, is a mode of governance that acknowledges that people likely have a view or perspective of their own to present on the application of a social norm to their conduct. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view. In this way it embodies a crucial dignitarian idea—respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.

The institutional character of law makes law a matter of argument, and this contributes yet another strand to law's respect for human dignity. Law presents itself as something one can make sense of. The norms that are administered in our legal system may seem like just one damned command after another, but lawyers and judges try to see the law as a whole; to discern some sort of coherence or system, integrating particular items into a structure that makes intellectual sense. And ordinary people take advantage of this aspiration to systematicity and integrity in framing their own legal arguments—by inviting the tribunal hearing their case to

consider how the position they are putting forward fits generally into a coherent conception of the spirit of the law.

As we noticed in our reference to the rights thesis, these are not just arguments about what the law *ought to be*—made, as it were, in a sort of lobbying mode. They are arguments of reason presenting competing arguments about what the law is. Inevitably, they are controversial: one party will say that such-and-such a proposition cannot be inferred from the law as it is; the other party will respond that it can be so inferred if only we credit the law with more coherence (or coherence among more of its elements) than people have tended to credit it with in the past. And so the determination of whether such a proposition has legal authority may often be a matter of contestation.[27]

In this way too, then, law conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state. This too is a tribute to human dignity.

5. *Legal Hierarchy and Legal Equality*

For us, dignity and equality are interdependent.[28] But one can imagine (or historically one can recall) systems of governance that involved a radical discrimination, in legal standing, among individuals of different ranks. High-ranking persons might be regarded as capable of participating fully in something like a legal system: they would be trusted with the voluntary self-application of norms; their word and testimony would be taken seriously; they would be entitled to the benefit of elaborate processes, and so on. Also among high-ranking persons, there might be important distinctions of which law applies. Those with a certain high dignity used to have the right to be tried according to a separate system of law. For

example, nobles used to be entitled to trial by their peers or by the House of Lords (as a court of first instance), certainly not by a common jury.[29] Or you might be unable to proceed against a duke or a baron for debt, in the ordinary way.

Consider this example. In 1606, in London, a carriage carrying Isabel, the Countess of Rutland, was attacked by serjeants-at-mace pursuant to a writ alleging a debt of £1,000.

> [T]he said serjeants in Cheapside, with many others, came to the countess in her coach, and shewed her their mace, and touching her body with it, said to her, we arrest you, madam, at the suit of the [creditor]...and thereupon they compelled the coachman to carry the said countess to the compter in Wood Street,...where she remained seven or eight days, till she paid the debt.[30]

The Star Chamber held that the "arrest of the countess by the serjeants-at-mace...is against law, and the said countess was falsely imprisoned" and "a severe sentence was given against [the creditor], the serjeants, and the others their confederates." The court quoted an ancient maxim to the effect that "law will have a difference between a lord or a lady, &c. and another common person," and it held that "the person of one who is...a countess by marriage, or by descent, is not to be arrested for debt or trespass; for although in respect of her sex she cannot sit in Parliament, yet she is a peer of the realm, and shall be tried by her peers." There are two reasons, the court went on, "why her person should not be arrested in such cases; one in respect of her dignity, and the other in respect that the law doth presume that she hath sufficient lands and tenements in which she may be distrained."[31] In light of this presumption of noble wealth, the seizing of her body cannot legally be justified as it could in those days to recover the debts of a commoner. Since then, however, things have changed. Now we apply this noble presumption to all debtors: we may not assume their wealth as the English court assumed the countess's, but we accord them the same

dignity. And in light of that, *no one's* body is allowed to be seized; no one can be held or imprisoned for debt.

At the other extreme, in our imagined (or recollected) hierarchical society, there might be a caste or class of persons, who were dealt with purely coercively by the authorities. There would be no question of trusting them or anything they said; they would appear in shackles if they appeared in a hearing at all; like slaves in ancient Athens, their evidence would be required to be taken under torture; and they would not be entitled to make decisions or arguments relating to their own defense, nor to have their statements heard or taken seriously. They would not necessarily be entitled to bring suit in the courts, or if they were it would have to be under someone else's protection; they would not be, as we sometimes say, *sui juris*. Slave societies were like that, and many other societies in the past, with which we are uncomfortably familiar, evolved similar discriminating forms that distinguished between (for example) the legal dignity of a noble, the legal dignity of a common man, the legal dignity of a woman, and the legal dignity of a slave, serf, or villein.

I think it is part of our modern notion of law that almost all such gross status differences have been abandoned (though there are relics here and there). We have adopted the idea of a single-status system,[32] evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before law that was previously confined to high-status individuals.

6. *Sortal and Condition Status*

I have said that dignity should be considered as a status. It is time to pause and reflect on this idea. Legal status has been defined by one jurist, R. S. Graveson, as

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law...whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents thereof are a matter of sufficient social concern.[33]

The monarch has distinctive powers; a bankrupt has distinctive disabilities; serving members of the armed forces have distinctive duties and distinctive privileges; and so on.[34]

I disagree with the claim, implicit in Graveson's definition ("a special condition...differing from the legal position of the normal person"), that there is no such thing as ordinary legal status. I am not sure why he says this, and I will explain why I disagree in a moment.

Before I do, I would like to introduce an elementary distinction between two types of status—*sortal* status and *condition* status, to elaborate what I am saying about a dignitarian society being, these days, a single-status society. (I base the terminology on the beginning of an intercession in the old Book of Common Prayer for "all sorts and conditions of men.")[35]

Let us begin with condition status. Some distinctions of status are still with us. There are legal statuses that apply to individuals in virtue of certain conditions they are in, that they may not be in forever, or that they may have fallen into by choice or happenstance: they embody the more important legal consequences of some of the ordinary stages of human life (infancy, minority), or some of the choices people make (marriage, felony, military service, being an alien), or some of the vicissitudes that ordinary humanity is heir to (lunacy) or that through bad luck or bad management may afflict one's ordinary dealings with others (bankruptcy, for example). I call these condition statuses. They tell us nothing about the underlying personhood of the individuals who have them: they arise out of conditions into which anyone might fall.

Condition status may be contrasted with sortal status. Sortal status categorizes legal subjects on the basis of *the sort of person*

they are. One's sortal status defines a sort of baseline (relative to condition status). Modern notions of sortal status are hard to find, but earlier I mentioned a few historical examples: villeinage and slavery. Racist legal systems such as that of apartheid era South Africa or American law from 1776 until (at least) 1867 recognized sortal statuses based on race. Some legal systems ascribe separate status to women. Sortal status represents a person's permanent situation and destiny so far as the law is concerned. It is not acquired or lost depending on actions, growth, circumstances, or vicissitudes. The idea behind sortal status is that there are different kinds of person.

Now it is precisely this last claim that the principle of *human* dignity denies. There are not different kinds of person, at least not for human persons.[36] We once thought that there were different kinds of human—slaves and free; women and men; commoners and nobles; black and white—and that it was important, from a social point of view, that there be public determination and control of the respective rights, duties, powers, liabilities, and immunities associated with personhood of each kind. We no longer think this. There is basically just one kind of human person in the eyes of the law, and condition status is defined by contrast with this baseline.

But *what kind* of person is that? What is the baseline of sortal status? We used to think there were many kinds: nobles, commoners, slaves, and so on. Which one have we made standard? The idea I pursued at the end of Lecture 1 is that we have made standard a rather high-ranking status, high enough to be termed a "dignity." The standard status for people now is more like an earldom than like the status of a peasant; more like a knight than a squire. Or forget the quaint Blackstonian conceits: it is more like the status of a free man than like a slave or bondsman; it is more like the status of a person who is *sui juris* than the status of a subject who needs someone to speak for him; it is the status of a right-bearer—the bearer of an imposing array of rights—rather than the status of

someone who mostly labors under duties; it is the status of someone who can demand to be heard and taken into account; it is more like the status of someone who issues commands than like the status of someone who merely obeys them.

Of course it is an equal status. We are all chiefs; there are no Indians. If we all—each of us—issue commands or demand to be taken seriously or insist on speaking for ourselves, it is everyone else—all of us, our peers, who have similar standing—who have to obey or make room or listen. But this does not mean that we might as well all be peasants or squires or bondsmen. High status can be universalized and still remain high, as each of an array of millions of people regards him- or herself (and all of the others) as a locus of respect, as a self-originating source of legal and moral claims. We all stand proud, and—if I may be permitted a paradox—we all look up to each other from a position of upright equality. I am not saying we always keep faith with this principle. But that is the shape of the principle of dignity that we're committed to. (And that, incidentally, is why I insisted, against Graveson, that we should be able to draw attention to the distinctive features of ordinary sortal status among us, even when there is no special sortal status to contrast it with.)

If I were to give a name the status I have in mind, the high rank or dignity attributed to every member of the community and associated with their fundamental rights, I might choose the term "legal citizenship." What I have in mind is something like the sense of citizenship invoked by T. H. Marshall in his famous book *Citizenship and Social Class*,[37] where he was concerned to tease out different strands of citizenship in a modern society. What I have been talking about in this lecture, we might associate with the specific dignity of what Marshall called "civil citizenship," though in his famous trichotomy of civil citizenship, political citizenship, and social citizenship, Marshall ran together under the "civil citizenship" heading ordinary civil liberties as well as rights of legal participation.

The civil element is composed of the rights necessary for individual freedom, liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law. This shows us that the institutions most directly associated with civil rights are the courts of justice.[38]

I think that if I were undertaking the sort of disaggregation of layers of citizenship that T. H. Marshall undertook, I might perhaps want to distinguish between legal citizenship and civil citizenship (in the sense that associates the latter with the full enjoyment of civil liberty), though of course Marshall is right that the two usually go together. As well, Marshall traced not only the expansion of the citizenship idea into new areas—from civil to political to social—but also, in each area, the expansion of the benefits and rights of citizenship to all the human members of a society. And it is this phase, with regard to legal citizenship, that I am focusing on here.

Another term we might use is "equality before the law"—though that by itself does not convey the *height* of the legal status that we have universalized. And by some philosophers it is confused with formal equality—that is, impartial application of general norms according to their terms.[39] Formal equality may or may not be important, but it is not what I am talking about here. I am talking about the equal rights of self-application, hearing, and argument in relation to the legal process.

7. *Representation*

Obviously the sense in which we stand equal before the law is somewhat fictitious. But we should remember the suggestion in my first lecture, that dignity might be something constructed rather than natural. I think one of the main techniques we use to construct equal dignity in law is the artifice of legal representation. David

Luban has developed a persuasive account along these lines.[40] Luban asks: Why should litigants have lawyers? He cites as the basis of his answer the following principle: "[O]ne fails to respect [a person's] dignity...if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith." From this, Luban infers:

> An immediate corollary to this principle is that litigants get to tell their stories and argue their understandings of the law. A procedural system that simply gagged a litigant and refused even to consider her version of the case would be, in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt. Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation....None of this should matter....Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece. Thus, [the] argument connects the right to counsel with human dignity in two steps: first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard.[41]

Forgive me for quoting Professor Luban at such length, but he makes exactly the point I want to make. We are committed to doing whatever it takes to secure the dignity of a hearing for everyone.

8. *Coercion*

Maybe the dignitarian account that I am giving makes law seem too "nice." Maybe I am obscuring the violent and coercive character of law.[42] Law kills people; it locks them up and throws away the key. And these are not aberrations; this is what law characteristically does. Where, it might be asked, is the dignity in that? Some have worried that "the entire enterprise, central to the criminal law, of regulating conduct through deterrence (that is, through the issuance of threats of deprivation and violence) is at odds with human dignity."[43] According to Lon Fuller, we have to choose between definitions of law that emphasize coercion and definitions of law that emphasize dignity.[44] I think this is a mistake. It is because law is coercive and its currency is life and death, freedom and incarceration, that its pervasive commitment to dignity is so momentous. Law is the exercise of power. But that power should be channeled through these processes, through forms and institutions like these, even when that makes its exercise more difficult or requires power occasionally to retire from the field defeated—this is exactly what is exciting about the equal dignity of legal citizenship in the context of the rule of law.

That is a wholesale answer to the objection. We might also give some retail responses. I have already mentioned the importance of self-application. Law looks wherever possible to voluntary compliance, which of course is not the same as saying we are never coerced, but which does leave room for the distinctively human trait of applying norms to one's own behavior. This is not a trick; it involves a genuinely respectful mode of coercion.

Max Weber is famous for observing that, although "the use of physical force is neither the sole, nor even the most usual, method of administration," still its threat "and in the case of need its actual use...is always the last resort when others have failed."[45] But it would be wrong to infer from this that law uses any means necessary to get its way. The use of torture, for example, is now banned by all legal systems.[46] Elsewhere I have argued that modern law observes this ban as emblematic of its commitment to a more general nonbrutality principle: "Law is not brutal in its operation;...it does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by methods which respect rather than mutilate the dignity and agency of those who are its subjects."[47] I think this general aspiration is now fully internalized in our modern concept of law. The law

may force people to do things or go places they would not otherwise do or go to. But even when this happens, they are not herded like cattle, broken like horses, beaten like dumb animals, or reduced to a quivering mass of "bestial desperate terror."[48]

Finally: law punishes. But again—and increasingly this too is internal to our conception of law—we deploy modes of punishment that do not destroy the dignity of those on whom it is being administered. Some of this is the work of the specific dignitary provisions we talked earlier, requiring that any punishment inflicted should be bearable—something that a person can endure, without abandoning his or her elementary human functioning.[49] One ought to be able to do one's time, take one's licks, while remaining upright and self-possessed. No one thinks the protection of dignity is supposed to preclude *any* stigmatizing aspect of punishment. Whatever one's dignity, there is always something shameful in having to be dealt with on the basis that one has violated the common standards set down in society for one's behavior. But an aristocratic society might distinguish between the inevitable stigma of the punishment accorded to a noble (in relation to his baseline dignity) and the inevitable stigma of the punishment accorded to a commoner or slave. There are punishments commensurate and punishments incommensurate with one's status in both cases. I believe James Whitman is right in his suggestion that in some European countries, there has been a sort of leveling up—outlawing the dehumanizing forms of punishment formerly visited upon low-status persons: everyone who is punished is to be punished now as though he were an errant noble rather than an errant slave.[50]

9. *Dignity and Normativity*

Is this account too naive? I know—we all know—that many political systems do not exhibit anything like the respect for dignity that I have outlined here. Also, every country has to cope with the

burden of its own history, with vestiges of its commitment to an ideology of differential dignity. Think of the United States, for example, burdened by a history of slavery and institutionalized racism. When the Thirteenth Amendment abolished slavery, it did not do so unconditionally, but made an explicit exception for the treatment of prisoners—"Neither slavery nor involuntary servitude, except as a punishment for crime..., shall exist within the United States"—as though Americans were anxious to maintain at least a vestige of the sortal status implicated in the great denial of human dignity that had for years disfigured their Constitution. I do not need to tell you the impression that is created when one combines an understanding of this reservation with the staggering racial imbalances in American penitentiaries.

American defendants are sometimes kept silent and passive in American courtrooms by the use of technology that enables the judge to subject them to electric shocks if they misbehave.[51] Reports of prisoners being "herded" with cattle prods emerge from time to time.[52] Conditions in our prison are de facto terrorizing and well known to be so; even if they are not officially approved or authorized, we know that prosecutors feel free to make use of defendants' dread of this brutalization as a tactic in plea bargaining. And generally: we often participate in what Sanford Kadish once termed "the neglect of standards of decency and dignity that should apply whenever the law brings coercive measures to bear upon the individual."[53] Other examples and examples from other countries (France, the United Kingdom, Russia, Israel, etc.) could be multiplied. All have fallen short of the characterization given in this lecture.

A legal system is a normative order, both explicitly and implicitly. Explicitly it commits itself publicly to certain rules and standards. Some of these it actually upholds and enforces, but for others, in certain regards, it fails to do so. The explicit content of the norms recognized by the legal system provides us with a pretty straightforward basis for saying, on these occasions, that the legal system

has fallen short of its own standards, without necessarily licensing the cynical conclusion that these were not its standards after all. This is because law is an institutionalized normative order, and there are ways of establishing the institutional existence (legal validity) of a given norm apart from its actually being fulfilled. A norm may be institutionalized in a given country inasmuch as it is proclaimed, posited, and published in that country, whether it is actually fulfilled or not. Or it may be, as we say, "honored in the breach," when its existence is revealed by the *way* in which we violate it (shamefacedly or furtively, for example).

Less straightforward is the case where a normative commitment is embodied *im*plicitly in the procedures and traditions of a system of governance. But I believe a similar logic obtains. The commitment to dignity that I think is evinced in our legal practices and institutions may be thought of as *immanently* present even though we sometimes fall short of it. Our practices sometimes convey a sort of promise and, as in moral life, it would be mistake to think that the only way to spot a real promise is to see what undertakings are actually carried out.[54] Law may credibly promise a respect for dignity, and yet betray that promise in various respects. Institutions can be imbued in their structures, practices, and procedures with the values and principles that they sometimes fall short of. In these cases, it is fatuous to present oneself as a simple cynic about their commitments or to neglect the power of imminent critique as the basis of a reproach for their shortcomings.

10. *Back to Morality*

At the beginning of these lectures, I said I would take my insights about dignity primarily from law. And I have combined this with an argument that the use of "*human* dignity" in constitutional and human rights law can be understood as the attribution of a high legal rank or status to every human being. I think we understand

now some of the ways in which legal systems constitute and vindicate human dignity, both in their explicit provisions and in their overall modus operandi. Is it possible to say in an exactly analogous sense that "morality" embodies a respect for human dignity? I wonder. Morality (in the relevant sense of critical morality) is not an *institutionalized* order; it is an array of reasons. And it may be harder to think of morality as *proceduralized* in the way that legal systems obviously are. On the other hand, moral thought does sometimes use institutional metaphors to convey the character and tendency of moral reasons: Kant's metaphor of the "kingdom of ends" is the best-known example.[55] And though we think perhaps less about moral due process than we ought to—we think about the reactive attitudes, but not nearly enough about how accusation, explanation, and response (including sanctions) ought to work in the context of the pursuit of moral reproach—there are proceduralized visions of morality in the work of philosophers like Jürgen Habermas and T. M. Scanlon, for example.[56]

Also we have to remember that a lot of what we call moral thought is not devoted to the establishment of a moral order *analogous* to a legal order, but is in fact oriented to the evaluation and criticism of the legal order itself. Political morality is *about* law, and so the place of dignity in political morality orients itself critically to the place of dignity in the legal system. What I have been arguing is that a lot of this moralizing involves *immanent critique*, rather than bringing standards to bear that are independent of those the law itself embodies. We evaluate law morally using (something like) law's very own dignitarian resources.

What about the hypothesis I have pursued that *human* dignity involves universalizing, rather than superseding, the connotations of status, rank, and nobility that "dignity" traditionally conveyed? These metaphors of transformation—of a change in the concept of dignity—may not make sense when we talk about critical morality.[57] But we can certainly talk of changes in our *understanding* of moral requirements. Moralists used to work with the notion that

there were different kinds of human being—low-status ones and high-status ones—and they have now dropped the idea of low-status human beings, assigning what was formerly high moral status to everyone.

Could respectable moral thought *ever* have differentiated in this way? Could morality have recognized different sortal statuses? Well we do this for the differences in moral considerability as between animals and humans. Or some do, and those who take this line claim that it is possible to draw it while still treating members of both classes morally. And there is no doubt that ideas about a distinctive dignity in which animals do not share play a large role in this distinction.[58] Could respectable moral thought ever have differentiated in this way *among humans*? Certainly it could; and it did. In 1907, the Clarendon Press at Oxford published the following in a two-volume treatise on moral philosophy by the Reverend Hastings Rashdall, concerning trade-offs between high culture and the amelioration of social and economic conditions:

> It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being—it may be ultimately the very existence—of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men.[59]

That is what passed for moral philosophy at Oxford a few generations ago. As far as I can tell there is nothing ironic in Rashdall's observation. It rests explicitly on what he calls "our comparative indifference to the welfare of the black races, when it collides with the higher Well-being of a much smaller European population."[60] For Rashdall, this is one of our considered judgments in what would now be described as *reflective equilibrium*: "Individuals, or races with higher capacities…have a right to more than merely equal consideration as compared to those of lower capacities."[61] This

comes close to accepting a distinction among humans, analogous to that which we accept as between humans and animals.

We may not be able to make sense of the idea that *morality* (moral reasons) has changed in this regard; but *we* have certainly changed in our moral views (however deplorable our conduct continues to be). And again, I want to say that our moral views have moved *upward* in this respect, according to all men and women now the moral respect and consideration that Hastings Rashdall thought should be accorded to "a much smaller number of white men."

We might have moved in the opposite direction. Edmund Burke feared that we were. Deploring, in his *Reflections on the Revolution in France*, the violation of the serene and beauteous dignity of the queen of France, Burke lamented that

> the age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded….Never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience.…[N]ow all is to be changed….All the decent drapery of life is to be rudely torn off. All the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion. On this scheme of things, a king is but a man, a queen is but a woman; a woman is but an animal, and an animal not of the highest order.[62]

This is what reactionaries always say: if we abolish distinctions of rank, we will end up treating everyone like an animal, "and an animal not of the highest order." But the ethos of human dignity reminds us that there is an alternative: we can flatten out the scale of status and rank and leave Marie Antoinette more or less where she is. Everyone can eat cake or (more to the point) *everyone's* maltreatment—maltreatment of the lowliest criminal, abuse of the most despised of terror suspects—can be regarded as a sacrilege, a violation of human dignity, which (in the words of Edmund

Burke) ten thousand swords must leap from their scabbards to avenge.

Notes

1. See, e.g., *The Earl of Lincoln against Roughton*, 79 Eng. Rep. 171; Cro. Jac. 196 (1606): "*Scandalum magnatum*; for that the defendant spake these words; 'My lord (innuendo the said Earl of Lincoln) is a base earl, and a paltry lord, and keepeth none but rogues and rascals like himself.' The defendant pleaded not guilty; and it was found against him. After verdict, it was moved in arrest of judgment, that these words were not actionable; for they touch him not in his life, nor in any matter of his loyalty, nor import him in any main point of his dignity, but are only words of spleen concerning his keeping of servants, which is not material. Yelverton and Fleming seemed to incline to that opinion; but Williams and Croke to the contrary, because they touched him in his honour and dignity; and to term him 'base lord' and 'paltry earl,' is matter to raise contempt betwixt him and the people, or the King's indignation against him: and such general words in case of nobility will maintain an action, although it will not in case of a common person."

2. I mean provisions like Article 7 of the ICCPR, "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment," Article 3 of the ECHR, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," and Common Article 3 of the Geneva Conventions and Article 8 of the Rome Statute of the International Criminal Court, which prohibit "outrages upon personal dignity."

3. See, for example, Parts 3 and 3A of the United Kingdom's Public Order Act 1986.

4. See Heyman, *Free Speech and Human Dignity* and Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate," *Harvard Law Review* 123 (2010): 1596.

5. ICCPR, Article 20 (2).

6. In *President of the Republic of South Africa and Another v. Hugo*, 1997 (4) SA (CC) 1, 1997 (6) BCLR 708, a case concerning gender discrimination, the South African Constitutional Court said that "the purpose of [South Africa's] new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups" (ibid., at § 92). The court said this dignitarian conception lay at the heart of the prohibition of unfair discrimination.

7. *Minister of Finance v. Van Heerden*, 2004 (11) BCLR 1125, at § 116. See also the discussion in Waldron, "The Dignity of Groups."

8. *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. § 51.

9. Ibid., §§ 53–54 and 72.

10. *R. v Kapp* [2008] SCR 41 at § 22: "Human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."

11. R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada," *Saskatchewan Law Review* 70 (2007): 1–26.

12. Alan Gewirth, "Rights and Virtues," *Review of Metaphysics* 38 (1985): 739–62, at p. 743.

13. See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 175–91, reprinted in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984): 77–90.

14. Ibid., p. 180 (*Theories of Rights*, p. 82).

15. But see H. L. A. Hart, "Bentham on Legal Rights," in *Oxford Essays in Jurisprudence*, 2nd series, ed. A. W. B. Simpson (Oxford: Clarendon Press, 1973): 171–201, for the beginnings of a retreat from this position.

16. Joel Feinberg, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970): 243–57.

17. Joel Feinberg, "Duties, Rights and Claims," *American Philosophical Quarterly* 3 (1966): 137–44, at p. 143.

18. Feinberg, "The Nature and Value of Rights," at p. 252.

19. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), esp. ch. 2.

20. See, e.g., H. L. A. Hart, "Book Review of Lon Fuller, *The Morality of Law*," *Harvard Law Review* 78 (1965): 1281–96, at p. 1284.

21. Fuller, *The Morality of Law*, p. 162.

22. See Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge and Philip P. Frickey (Westbury, NY: Foundation Press, 1994), pp. 120–21.

23. It is part of the modern positivist understanding of law that we should appreciate the way in which norms are designed to *guide action* rather than simply coerce it. On the other hand, positivist jurisprudence is cautious about pursuing the implications that this may have for law's commitment to human dignity. Jules Coleman, for example, who places great emphasis on the way law guides action, is at pains to insist that the action-guiding function of law is not necessarily expressive of any dignitarian value. He tries to separate the issues in this way. In *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), pp. 194–95, Coleman writes: "Law just is the kind of thing that can realize some attractive ideals. That fact about law is not necessarily part of our concept of it."

24. Michael J. Meyer, "Dignity, Rights, and Self-Control," *Ethics* 99 (1989): 520–34.

25. Kant's moral psychology celebrated in individuals the power to subordinate impulse and desire to the lawlike demands of morality, revealing, as he says, "a life independent of animality." See Kant, *Critique of Practical Reason*, pp. 269–70 (5:162).

26. See Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 353–409.

27. The legal philosopher who has done the most to develop this theme is Ronald Dworkin, particularly in *Law's Empire* (Cambridge: Harvard University Press, 1986).

28. See Arthur Chaskalson, "Human Dignity as a Constitutional Value," in Kretzmer and Klein, *The Concept of Human Dignity*: 133–44, at p. 140.

29. *Magna Carta* (1215), Article 21: "Earls and barons shall not be amerced except through their peers."

30. *Isabel, Countess of Rutland's Case*, 6 Co. Rep. 52 b, 77 Eng. Rep. 332 (1606), at p. 336.

31. Ibid., p. 333.

32. I take this phrase from Vlastos, "Justice and Equality," p. 55.

33. Graveson, *Status in the Common Law*, p. 2.

34. Is "status term" anything more than an abbreviation for all this detail? John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 5th edition, ed. Robert Campbell (London: John Murray, 1885), Lecture 40, pp. 687–88, did not think so. He believed that "[t]he sets of rights and duties, or of capacities and incapacities, inserted as *status* in the Law of Persons, are placed there merely for the sake of commodious exposition" and he treated each status term as "an ellipsis (or an abridged form of expression)" (ibid., p. 700). But Austin's skepticism neglects the idea, intimated in Graveson's definition, that a status attaches to a person when his occupying a certain position is a matter of social concern. Jeremy Bentham held a view of this kind. Austin (ibid., p. 699) noted that in *Traités de Législation*, Bentham defined a status as "un état domestique ou civil n'est qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités." The idea of the "base idéale"—the underlying reason—is crucial. The underlying reason explains how the various rights, duties, etc. hang together. Statuses package certain arrays of rights, duties, etc. under the auspices of a certain entrenched and ongoing concern in the law. No doubt Austin is right that status also has an exegetical use, in helping us organize and present legal knowledge in treatises, etc. But, as Bentham saw, its expository function is not just mnemonic, it is dynamic.

35. See *The 1928 Book of Common Prayer* (New York: Oxford University Press, 1993), p. 18: "O God, the Creator and Preserver of all mankind, we humbly beseech thee for all sorts and conditions of men; that thou wouldest be pleased to make thy ways known unto them, thy saving health unto all nations."

36. There might be different kinds of corporate personality. See Graveson, *Status in the Common Law*, pp. 72–78.

37. T. H. Marshall, *Citizenship and Social Class*, ed. Tom Bottomore (London: Pluto Press, 1992). See also Desmond King and Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Rights," *British Journal of Political Science* 18 (1988): 415–43, reprinted in Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993): 271–308.

38. Marshall, *Citizenship and Social Class*, p. 8.

39. See, e.g., Wojciech Sadurski, *Equality and Legitimacy* (New York: Oxford University Press, 2008), p. 94.

40. David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) and David Luban, "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)," *University of Illinois Law Review* 2005: 815–45.

41. Luban, "Lawyers as Upholders of Human Dignity," p. 819.

42. See, e.g. Austin Sarat and Thomas Kearns, "A Journey through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law*, ed. Austin Sarat and Thomas Kearns (Ann Arbor: University of Michigan Press, 1991): 209–74.

43. See Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law," *Harvard Law Review* 97 (1984): 625–77 at pp. 672–73.

44. Fuller, *The Morality of Law*, p. 108.

45. Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), p. 54.

46. This is why the recent proposals in the United States to introduce judicial torture warrants and to make torture a procedure in law (not just in Blackstone's words—Morrison, *Blackstone's Commentaries on the Laws of England*, 4:257 [ch. 25]—"an engine of state") aroused such anger in parts of the legal community. The proposal is mooted and discussed in Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), pp. 156–63. See generally, Jeremy Waldron, "Torture and Positive Law," *Columbia Law Review* 105 (2005): 1681–1750 (reprinted in Waldron, *Torture, Terror and Trade-Offs*, pp. 186–260), at pp. 1718–20 (*Torture, Terror, and Trade-Offs*, pp. 247–52), for a fuller discussion.

47. This is adapted from Waldron, "Torture and Positive Law," at p. 1726 (*Torture, Terror, and Trade-Offs*, p. 232).

48. Hannah Arendt, *The Origins of Totalitarianism*, new edition (New York: Harcourt Brace Jovanovich, 1973), p. 441.

49. See Waldron, *Torture, Terror, and Trade-Offs*, p. 307.

50. See Whitman, "Human Dignity in Europe and the United States."

51. See, e.g., Harriet Chiang, "Justices Limit Stun Belts in Court," *San Francisco Chronicle*, August 23, 2002, p. A7 and William Glaberson, "Electric Restraint's Use Stirs Charges of Cruelty to Inmates," *New York Times*, June 8, 1999, p. A1.

52. See, e.g., "37 Prisoners Sent to Texas Sue Missouri," *St. Louis Post-Dispatch* (Missouri), September 18, 1997, p. 3B: "Missouri prisoners alleging abuse in a jail in Texas have sued their home state and officials responsible for running the jail where a videotape showed inmates apparently being beaten and shocked with stun guns," and Mike Bucsko and Robert Dvorchak, "Lawsuits Describe Racist Prison Rife with Brutality," *Pittsburgh Post-Gazette*, April 26, 1998, p. B1.

53. Sanford H. Kadish, "Francis A. Allen: An Appreciation," *Michigan Law Review* 85 (1986): 401–5, at p. 403.

54. Cf. Jeremy Waldron, "Does Law Promise Justice?" *Georgia State University Law Review* 17 (2001): 759–88, at pp. 760–61. For analogous arguments about justice, see Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992), p. 443: "Law is not necessarily just, but it does promise justice." See also John Gardner, "The Virtue of Justice and the Character of Law," *Current Legal Problems* 53 (2000): 31–52.

55. Kant, *Groundwork*, pp. 83–88 (4:433–34).

56. See Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 1991) and T. M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998).

57. John Finnis once observed, in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 24, that "of natural law itself there could, strictly speaking, be no history," meaning that natural law is a timeless set of values, reasons, and requirements.

58. Psalm 8:4–8, for example: "What is man, that thou art mindful of him?...For thou hast made him a little lower than the angels, and hast crowned him with glory and honour. Thou madest him to have dominion over the works of thy hands; thou hast put all things under his feet: all sheep and oxen, yea, and the beasts of the field; the fowl of the air, and the fish of the sea, and whatsoever passeth through the paths of the seas."

59. Hastings Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy*, 2nd edition (Oxford University Press, 1924), 1:237–38. Rashdall appends a footnote: "The exclusion is far more difficult to justify in the case of people like the Japanese, who are equally civilized but have fewer wants than the Western" (ibid., p. 238). The author continued: "If

we do defend it" (and he had no doubt that we would), "we distinctly adopt the principle that higher life is intrinsically, in and for itself, more valuable than lower life, though it may only be attainable by fewer persons, and may not contribute to the greater good of those who do not share it."

60. Ibid., p. 241.

61. Ibid., p. 242.

62. Edmund Burke, *Reflections on the Revolution in France*, ed. Leslie Mitchell (Oxford: Oxford University Press, 1993), p. 77.

Comments